



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 31 OF 2017

IBRAHIM HUSSEIN KIMURGOR.....OBJECTOR/APPLICANT

VERSUS

1. HELLEN CHERONO KIMURGOR.....1ST PETITIONER/ RESPONDENT

2. MATILDA CHEMELI BACHIA.....2ND PETITIONER/ RESPONDENT

3. AGNES MURGOR.....3RD PETITIONER/ RESPONDENT

4. CAROLINE CHEBET MURGOR.....4TH PETITIONER/RESPONDENT

5. NATASHA CHEROTICH MURGOR.....5TH PETITIONER/RESPONDENT

6. KATHLEEN CHEPKORIR MURGOR.....6TH PETITIONER/RESPONDENT

JUDGMENT

1. The applicants (**Hellen Cheron, Caroline Chebet and Matilda Chemei**) who are the administrators of the estate of **Charles Chemimoi Kimurgor** sought for orders;

a) That the grant of letters of administration intestate made to them on 23rd May 2014 be confirmed.

b) That the costs of this application be in the cause.

2. The grounds are:

a) That the applicants obtained letters of administration on 23rd May 2014.

b) That a period of 6 months has elapsed since the issuance of the letters of administration intestate.

c) There is no pending application for provisions of dependants

d) The identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined.

e) There is no outstanding estate duty payable to the commissioner of lands in respect of the deceased's estate.

3. The applicants swore affidavits in support of the application where they reiterated the above grounds and added that the identification and shares of all persons beneficially entitled to the said estate has been ascertained and determined as between all parties save for **Ibrahim Murgor** who declined to attend any meetings to discuss the distribution.

4. The agreement for distribution of the suit property was as follows:

	NAME	DESCRIPTION OF PROPERTY	SHARES OF HEIRS
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1.	Ibrahim Murgor	Nandi/ Kiminda/1294	100%
2.	Ibrahim Murgor	Muhoroni Township/Kisumu/21959/14 (5 acres)	100%
3.	Ibrahim Murgor	KAE 550P Massey Ferguson (Tractor)	100%
4.	Ibrahim Murgor	KAN 576R Massey Ferguson (Tractor)	100%
5.	Matilda Chemeli Murgor	Uasin Gishu/ Illula/3	20%
6.	Mary Aghes Cheptarus Murgor	Uasin Gishu/ Illula/3	20%
7.	Caroline Chebet Murgor	Uasin Gishu/ Illula/3	20%
8.	Natasha Cherotich Murgor	Uasin Gishu/ Illula/3	20%
9.	Kathleen Chepkorir Murgor	Uasin Gishu/ Illula/3	20%
10.	Hellen Cherono Kimurgor	Eldoret Municipality/ Block 9/1230	100%
11.	Hellen Cherono Kimurgor	Eldoret Municipality/ Block/ 14/1073	100%
12.	Hellen Cherono Kimurgor	Eldoret Municipality Block 14/1074 Block of 8 apartments	100%
13.	Hellen Cherono Kimurgor	Plot Numbers 3 and 4 Biribiriet T.C	100%
14.	Hellen Cherono Kimurgor	LR NO. 21959/14 Muhoroni	100%
15.	Hellen Cherono Kimurgor	Eldoret Municipality/ Block 51	100%
16.	Hellen Cherono Kimurgor	157 shares in Kenya Airways	100%
17.	Hellen Cherono Kimurgor	Apartment at Block A Unit A5 LR No. 209/13753	100%
18.	Hellen Cherono Kimurgor	Kenya Commercial Bank Account No. 1103389890	100%
19.	Hellen Cherono Kimurgor	Kenya Commercial Bank Account No. 11016088899	100%

5. The objector (**Ibrahim Murgor**) filed an affidavit in protest of the summons for confirmation of grant and the proposed mode of distribution of the estate. He states that the administrator/petitioner has deliberately and intentionally failed to disclose and or bring to the attention of the existence of other movable assets of his deceased father. He enumerated certain movable assets that he stated ought to be added to the inventory being:

i) Motor Vehicle Reg. No. KAS 192S Toyota Prado

ii) Motor Vehicle Reg. No. KAM 169R Rav4

iii) Motor Vehicle Reg. No. KAJ 311C Toyota

iv) Motor Vehicle Reg. No. KAA 718 R Isuzu

v) Motor Vehicle Reg. No. KAV 148R Nissan

vi) Motor Vehicle Reg. No. KAN 576R Tractor

vii) Motor Vehicle Reg. No. KAE 155X Land Rover

viii) Motor Vehicle Reg. No. KAN 880H Mercedes Benz

ix) Motor Vehicle Reg. No. KYH 991 Suzuki

x) Motor Vehicle Reg. No. KAA 719R Lorry

xi) Motor Vehicle Reg. No. KAD 174X Pajero

xii) Motor Vehicle Reg. No. KXQ Ford Tractor

6. The objector states that the petitioners intentionally failed to make full disclosure of the foresaid movable properties of the deceased Estate, which is tantamount to depriving other beneficiaries of the Estate of the deceased.

7. He states that since his father's demise, there have been deliberate attempts to disinherit him especially when he was selling part of the estate to 3rd parties before the conclusion of the succession cause.

8. He states that the application was made in bad faith indicating that the identification or shares in the Estate of all beneficiaries had been ascertained and determined between all parties save for him.

9. The objector states that he is opposed to the proposed mode of distribution and outlines his proposed mode as follows;

Name	Description of Property	Shares of Heirs
Ibrahim Hussein Murgor	Nandi/ Kiminda/1294 (0.3 acres)	100%
Ibrahim Hussein Murgor	Uasin Gishu/ Illula/3 (50 acres (home)	25%
Matildah Chemei Murgor	“	15%
Mary Agnes Murgor	“	15%
Caroline Murgor	“	15%
Natasha Murgor	“	15%
Kathleen Murgor	“	15%
Hellen Cheronno Murgor	Eldoret Mun/ Block 9/1230	50%
Ibrahim Hussein Murgor	“	50%
Hellen Cheronno Murgor	Eldoret Mu/ Block/14/1073	“
Ibrahim Hussein Murgor	“	“
Hellen Cheronno Murgor	Eldoret/Mun/Block 14/1074 Sagara Apartments	Holding in trust for the whole family

Ibrahim Hussein Murgor	“ “	
Hellen Cheronno Murgor Ibrahim Hussein Murgor	Muhoroni Township/ Kimwani L.R. No. 2195940 (50 Acres) “ “	50% 50%
Ibrahim Murgoi	L.R. No.....Kuinet (UG)	100%
Hellen Cheronno Kimurgor Caroline Chebet Murgor	Plot No. 3 & 4 Biribiriet T.C “ “	50% 50%
Ibrahim Murgor Hellen Cheronno Murgor	Apartment at Block 'A' unit A5 L.R. No. 209/137553 (Nairobi)	Holding in Trust for the family
Hellen Cheronno Murgor	157 shares in Kenya Airways	100%
Hellen Cheronno Murgor	K. C. B. A/C No. 11033898990	Equal
Hellen Cheronno Murgor	K. C. B. A/C No. 11016088899	Equal
Ibrahim Hussein Murgor	Motor Vehicle Reg. No. KAE 550 P Massey Ferguson (Tractor)	100%
Ibrahim Murgor	Motor Vehicle Reg. No. KAN 576R Massey Ferguson (Tractor)	100%
Hellen Cheronno Murgor	M/V Reg. No. KAM 169R RAV4	100%
Agnes Murgor	M/V Reg. No. KAJ 311C Toyota	100%
Hellen Cheronno Murgor	M/V Reg. No. KAN 880H Mercedes Benz	100%
Natasha Murgor	M/V Reg. No. KAE 155X Land Rover	100%
Kathleen Murgor	M/V Reg. No. 192S Prado	100%
	M/V Reg. No. KAD 174X Pajero	100%
Hellen Murgor	M/V Reg. No. KAA 718R	100%
Ibrahim Murgor	M/V Reg No. KAA 719 R Lorry	100%
Matilda Murgor	M/V Reg. No. KAS 192 Prado	100%
Hellen Murgor	Livestock Freshian Cattle (10)	3
Kathleen Murgor		2

Ibrahim Murgor		2
Caroline Chebet		2
Natasha Murgor		1

10. The objector states that he is aware the petitioners have transferred some of the fixed assets to herself and some of the proceeds from the illegal sale of the Motor Vehicles have already been banked in personal accounts of the administrators. Additionally, that, the proceeds from the rental income, farming and livestock have all been utilized by the petitioner and other siblings to his exclusion.

11. The emergent issue for determination from both the objectors and the petitioner's pleadings is the mode of distribution.

The petitioners in their submissions indicate that they are all in agreement with the proposed mode of distribution which was deliberated and agreed upon, with a consent to the confirmation of grant being signed on 9th May 2016 and filed on 17th May 2016. They categorically state that the objector refused to attend/participate in the said deliberations.

12. The first petitioner, just like the 2nd to 6th petitioners above sought that the objector's mode of distribution be dismissed. She submits that the objector's claims do not hold water citing for instance the doctrine of survivorship where the money in joint accounts is concerned. She states that the law provides that property automatically passes to the surviving owner if it was held jointly and cited the case of **MWANGI GAKURI vs. BERNARD KIGOTHO MAINA & ANOTHER, H.C NBI SUCCESSION CAUSE NO. 2335/2011** where the court found that the principle of survivorship operates to remove jointly owned property from the operation of the law of succession upon the death of one of the joint tenants.

13. In view of the property acquired as matrimonial property, the 1st petitioner states that all the beneficiaries to the estate are adults and therefore, there is no basis for the same being held in trust. She states that the court should direct that 100% of the property be inherited by the 1st Petitioner which the 2nd to 6th petitioners were in agreement with.

14. Citing the case of **RE ESTATE OF SBS (2014) ECLR**, she highlighted that the objector had been benefiting from the deceased's estate, being the one it is assumed that one who is managing the affairs of the estate is also benefiting from the proceeds.

15. She also cited the case of **BOB NJOROGE NGARAMA** which was referred to in the 2nd to 6th Petitioners submissions saying that the life interest remains with her as the widow and it is only after her demise and or remarriage that a plot will be distributed.

16. The 1st petitioner cites the objectors conduct as the main reason she prefers that he be denied shares in the matrimonial home. She stated that the deceased had issued property (**NANDI/KIMINDIA/1294**) to the objector in his lifetime to maintain peace in the family and the sought that the court maintain it.

17. The petitioners submit that the objector is not the deceased's biological son and had shown an abusive attitude toward the court and other beneficiaries. They pointed out that the objector had been involved in several criminal cases involving the assault of some of the deceased's dependents and violation/damage of assets, intermeddling with the estate and assaulting and insulting tenants of the estate. They listed several allegations against the objector all showing that his conduct was questionable and unfavorable even when the deceased was alive.

18. The petitioners further contend that the objector had been invited to be part of the proceedings but he remained aloof; refusing to sign the probate and administration application and consent sent to him. That in any event, they all contributed to the estate but the objector added nothing but instead has taken from the estate.

19. On the issue of distribution, the petitioners argue that the objector deserves the smallest share of the estate, having already been assigned part of the estate long before the estate was distributed. They maintain that he is arguably not a beneficiary even within the meaning of Section 3 and section 39 of the Succession Act.

20. They add that the objector failed to discharge the burden of proof that he was raised, provided for or taken care of by the deceased. They lament that he has subjected the estate to waste in excess of Kshs. 10 million.

21. The petitioners cited the case of **RE ESTATE OF FRANCIS MARETE M'MURUNGI** where section 3(2) was cited, and the court declared that the first objector was not entitled to the estate as there was no evidence that the deceased had taken care of him. In this case, the judge stated that occasional gestures to assist the objector do not amount to him being a dependent.

22. In **E.M.M vs. I.G.M & ANOTHER 2014 ECLR** and in **RE ESTATE OF M'MUTHAMIA MWENDWA (DECEASED) 2016 ECLR**, the above fact was re-stated where there was no evidence that the deceased had taken the 1st objector as his own son.

23. The petitioners further submit that the objector had received an inter vivos gift LR Nandi Kiminda/1294 measuring 0.3 acres in Kapsabet and a house constructed for him by the deceased. In regard to this the case of **JOHANES MBUGUA MUCHUKU vs. LOIS WANGUI MUCHUKU & 6 OTHERS (2016)** was cited, where the court stated that a gift inter vivos does not bar a dependent from getting a share of the residue of the intestate estate. Still in view of the issue of the gift, the judge in the case of **REGINA NYAMBURA WAITATHU vs. TARCISIO KAGUNDA WAITHATHU & 3 OTHERS 2016 (ECLR)** stated that Section 42 provides that during the distribution of the estate, previous benefits of gift inter-vivos be taken into consideration/ into account when determining the share of each child.

24. In view of section 35 of the Law of Succession Act, the petitioners cited **JUSTUS THIORA KIUGU & 40OTHERS vs. JOYCE**

NKATHA KIUGU & ANOTHER (2015) ECLR and BOB NJOROGE NGARAMA vs. MARY WANJIRU NGARAMA & ANOTHER (2014) ECLR stating that the net estate is not available for distribution during the lifetime of the widow. The only condition to this apart from the death of the widow stated in Section 35(1) is that the life interest terminates upon her remarriage.

Section 35 of the Law of Succession provides as follows:

35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his

representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

25. In making reference to the case of **Justus Thiora**, made the petitioners submitted that where the deceased's children and his widow do not agree or consent on distribution, the estate is to remain undisturbed for the widow to enjoy life interest, holding the property in trust for the children. In view of this the 2nd to 6th petitioners state that the estate is to be left in the hand of their mother/the widow and it is up to her how the distribution should take place/how the estate is to be shared.

26. The petitioners re-stated that their mother had made both direct and indirect contribution to the matrimonial properties of the home and therefore, was legally entitled to them. Additionally, they submit that all the funds in the joint accounts should go to the widow. The 2nd to 6th petitioners actually submit that they are willing to forego or cede any share of the estate they are entitled to in favour of their mother.

27. The petitioners seek that the proposed mode of distribution by the objector has no merit and ought to be dismissed.

28. The objector submits that being the son of the deceased and his wife **Hellen Cheron Kimurgor**, he was fully dependent on the deceased and had been maintained by them prior to his death. The objector states that he had enjoyed a cordial relationship with his siblings and parents all through, citing instances where he invited them to the United Kingdom when he resided there.

29. The objector states that the exclusion of his name as one of the dependants of the estate was a malicious act instigated by his sisters out of bad faith. He moved the court through a cross petition when he discovered that his sisters had begun to dispose of some of the property but states that his efforts to try and engage his family to preserve their property fell on deaf ears.

30. He cited several cases which he submits had been filed against him out of bad faith and with the intention of poisoning the court's mind. He submits that he has been discharged/acquitted in all the criminal cases where the courts have implored the family to solve their disputes amicably.

31. He cited the 1st Petitioner's witness statement where she acknowledged the objector to be her first born son but not the biological son of the deceased. She however stated that he had been living with the late husband since he was 16 years old. He added that as far as he is concerned, he knew that he had been sired by the deceased and the 1st petitioner unless otherwise is proved.

32. The objector denied allegations of being violent and submitted that he has been taking care of the 1st petitioner and channeling all the income of the deceased properties into her account held together with Matilda Chemeli Bachia.

33. The objector cited the issues for determination as being;

- a) Whether the deceased died Testate or Intestate
- b) Whether the objector is a dependent, beneficiary as per the provisions of Section 26 – 35.
- c) Whether the petitioners deliberately and with impunity excluded the objector from the succession proceedings
- d) Whether the objection proceedings resulted to the family feud

34. It is reiterated that the deceased died intestate and that the objector was a dependant of the deceased until his demise. He cites the case of **ESTATE OF JONATHAN MUTUA MUSI (DECEASED) MACHAKOS HIGH COURT P & A NO. 95/1995** where it was held that a child from an adulterous union is entitled to inherit his father and cannot be expected to prove his mother's marriage to his father.

35. The objector cites **Section 3** of the Law of Succession Act to state that where the issue of paternity cannot be proved where there is evidence that the deceased took in the child and accepted him as his own hence he will be treated as a child for the purpose of succession. He also cited section 38 which enshrined the principle of equal distribution of the net estate to the surviving children of the deceased.

ANALYSIS & DETERMINATION

36. The court is called upon to make a determination whether the mode of distribution as proposed ought to be upheld.

37. Section 28 lays down what the court ought to consider in making this determination;

28. Circumstances to be taken into account by court in making order

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-

- (a) the nature and amount of the deceased's property;***
- (b) any past, present or future capital or income from any source of the dependant;***
- (c) the existing and future means and needs of the dependant;***
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime; [underlining mine for emphasis]***
- (e) the conduct of the dependent in relation to the deceased;***
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;***
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.***

38. The peculiar set of circumstances is paramount in determining the cause as far as mode of distribution is concerned. It is clear from the above pleadings, witness statements filed and submissions made that the petitioners are in agreement as regards the distribution of the said property. Moreover, it is also clear that the objector has always been at logger heads with the rest of the family.

39. It is no surprise then that there emerges a conflict between the parties. The petitioners (2nd to 6th) petitioner's assertions that the objector is not a family member/was not the deceased's son is clearly questionable as the objector has been recognized as a son and therefore a dependant of the deceased all through. By virtue of this fact then, the objector is entitled to his share of the deceased's estate.

In arriving at the decision on mode of distribution however, as cited in Section 28 of the law of Succession Act, the court must put into consideration several factors.

40. Worthy of note and relevant to this particular scenario is the conduct of the objector and whether he had received anything from the deceased before his death. The objector does not deny that he has received and is currently in possession of several of the deceased possessions.

The house-hold items would not be available for distribution by virtue of section 35, those go to the widow, and her mode of distribution does not seek to disinherit him as claimed and in all fairness and equity, the distribution of the estate has been rightly done by the petitioners. The objector has listed some additional assets, but I have not seen any documents confirming that they were registered under the deceased's name. Likewise, the claim that some of the assets were purchased by the widow, is a sweeping statement with no evidence to support

41. In view of the afore-going, I find that there is no merit in the application and dismiss the claims by the objector. I therefore uphold the petitioners proposed mode of distribution.

DELIVERED, SIGNED AND DATED AT ELDORET THIS 14TH DAY OF JUNE 2019

H. A. OMONDI

JUDGE